Di Giulio v New York City Tr. Auth.
2025 NY Slip Op 32738(U)
August 1, 2025
Supreme Court, New York County
Docket Number: Index No. 151947/2024
Judge: Richard Tsai

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD TSAI** **PART** **21**

Justice

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GIOVANNI DI GIULIO

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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INDEX NO. 151947/2024

MOTION DATE 03/17/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 1, 4, 5, 7-15, 17-20 were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents, it is **ORDERED** that defendant's motion to strike the second amended bill of particulars (NYSCEF Doc. No. 5) is **GRANTED IN PART TO THE EXTENT THAT** the following allegations of the second amended bill of particulars are stricken: "in failing to install guard rails or barriers at said subway platform; in failing properly monitor and coordinate train schedules and elevator availability with handicapped passenger volume and access[i]bility," and the motion is otherwise denied.

Pursuant to CPLR 3025, 3042, 3211 (a) (5) and (7) and General Municipal Law §§ 50-e (1) and (5), defendant moves to strike plaintiff's second amended bill of particulars, on the ground that the additional allegations are outside the scope of the notice of claim. Plaintiff opposes the motion.

BACKROUND

On or about January 18, 2024, defendant New York City Transit Authority (NYCTA) received a notice of claim from plaintiff, which alleges that plaintiff suffered personal injuries on November 16, 2023, inside the subway station at 14th Street/Union Square, on the platform of the L train (*see* defendant's Exhibit A in support of motion [NYSCEF Doc. No. 9]).

The notice of claim states, in relevant part:

Mr. Di Giulio, who is a quadriplegic and uses a motorized wheelchair to get around, exited the "Q" train at the 14th Street/Union Square station with the intention of taking the elevator to exit to the street, but when he attempted to do so he found that the elevator to the street was out of service. He then proceeded to take a different elevator to go down to the "L" train platform in order to take an "L" train to its Eighth Avenue station to try to use the elevator there to exit to the street.

Upon reaching the "L" train platform at the 14th Street/Union Square station via the elevator, Mr. Di Giulio proceeded to go to the area of the "L" train platform that was designated for handicapped boarding of trains. To reach that boarding area from the elevator in which he had descended to the "L" train platform, he was forced to traverse a section of the platform which ran between a staircase and the tracks and was consequently extremely narrow. While traversing that section in his motorized wheelchair, one or more of the wheels on one side of his wheelchair went over the edge of the platform and Mr. Di Giulio fell onto the subway tracks with his wheelchair.

* * *

It is claimed that the MTA/NYC Transit was negligent in creating a dangerous condition in the form of placing the designated boarding area for handicapped persons on the aforementioned "L" train platform at a point away from the elevator (the only means by which wheelchair-bound customers could reach that platform) which could only be reached by wheelchair-bound customers by their traversing the section of the platform between a staircase and the train tracks that was too narrow to be safely negotiated by persons in wheelchairs; in creating a dangerous condition in the form of a subway platform section on the aforementioned "L" train platform that was too narrow to be safely negotiated by persons in wheelchairs; in permitting to exist the aforesaid dangerous conditions which the MTA/NYC Transit created or of which it had actual and/or constructive notice; in failing to rectify the aforesaid dangerous conditions which the MTA/NYC Transit created or of which it or they had actual and/or constructive notice.

It is also alleged that by reason of the creation, maintaining and failing to rectify the foregoing dangerous conditions, the MTA/NYC Transit violated the provisions of the Americans with Disabilities Act.

(*see* defendant's Exhibit A in support of motion [NYSCEF Doc. No. 9]).

On March 4, 2024, plaintiff commenced this action (*see* NYSCEF Doc. No. 1 [summons and complaint]). Defendant answered the complaint on or about May 6, 2024 (*see* NYSCEF Doc. No. 4).

On February 14, 2025, plaintiff e-filed a second amended bill of particulars (*see* NYSCEF Doc. No. 5). The second amended bill of particulars added (as compared with the second bill of particulars) the following allegations of negligence:

> "in failing to provide clear, proper and appropriate signage and warnings; in failing to highlight the "I" Beam column with red and white stripes indicating a hazardous area is approaching; in failing to install guard rails or barriers at said subway platform; in failing properly monitor and coordinate train schedules and elevator availability with handicapped passenger volume and access[i]bility; in failing to properly position the

> designated boarding area for handicapped persons; failing to determine when it is appropriate close off the narrow path to disabled people with motorized or manual wheelchairs" (*see* defendants' Exhibit F in support of motion [NYSCEF Doc. No. 14]).

DISCUSSION

The NYCTA moves to strike or dismiss the additional allegations in the second amended bill of particulars, on the ground that they are newly pleaded theories of liability that were not previously alleged in the notice of claim (*see* affirmation of defendant's counsel ¶¶ 18-26 [NYSCEF Doc. No. 8]).

In opposition, plaintiff argues that the allegations are not new theories of liability, but an elaboration/amplification of existing theories set forth in the notice of claim—that the NYCTA created, permitted to exist, and failed to rectify a dangerous condition on the platform (*see* affirmation of plaintiff's counsel in opposition ¶ 7 [NYSCEF Doc. No. 18]).

On the one hand, the NYCTA correctly argues that

> "[c]auses of action for which a notice of claim is required, that are not delineated in the plaintiff's original notice of claim, may not be interposed because [t]he addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiff['s] claims" (*Garcia v O'Keefe*, 34 AD3d 334, 335 [1st Dept 2006] [internal quotation marks and citations omitted]; *Manns v New York City Tr. Auth.*, 50 AD3d 860, 861 [2d Dept 2008]; *Moore v County of Rockland*, 192 AD2d 1021, 1023 [3d Dept 1993]).

Thus, allegations that are not included in a notice of claim that would alter the substantive nature of the claims may not be introduced by way of an amendment to the bill of particulars (*Basturan v New York City Tr. Auth.*, 231 AD3d 528, 529 [1st Dept 2024]; *Tiburcio v New York City Tr. Auth*., 270 AD2d 110, 110 [1st Dept 2000]).

However, as plaintiff points out, "a notice of claim does not have to set forth a precise legal theory of recovery" (*Miller v City of New York*, 89 AD3d 612, 612 [1st Dept 2011]). "The Legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories, proper for the pleadings, in the notice of claim, which must be filed within 90 days of the occurrence" (*DeLeonibus v Scognamillo*, 183 AD2d 697, 698 [2d Dept 1992]; *Castro v City of New York*, 141 AD3d 456, 459 [1st Dept 2016]).

> "[T]here is a tension between the line of cases cited in *Miller* (89 AD3d 612) and the line of cases cited in *Garcia* (34 AD3d 334). On the one hand, *Miller* emphasizes that a notice of claim does not have to plead a cause of action or legal theory, but on the other hand, *Garcia* requires the

> Court to look at a notice of claim for causes of action and legal theories, to determine whether causes of action pleaded in a plenary action would 'substantially alter' the nature of the claim(s) set forth in the notice of claim. Moreover, the tension exists because the Court of Appeals has reaffirmed that General Municipal Law § 50-e 'does not require those things [notices of claim] to be stated with literal nicety or exactness'' (*Brown*, 95 NY2d at 393 [citation omitted]), yet warned that 'Section 50-e does not abet notice of claim by stealth.' (*Rosenbaum*, 8 NY3d at 12.)" (*Boles v City of New York*, 2012 NY Slip Op 51790[U], 36 Misc 3d 1241[A], at *8-9 [Sup Ct, NY County 2012]).

Where, as here, a notice of a claim specifically mentions negligence, courts have, for the most part, dismissed a cause of action for negligence based on acts or omissions that cannot be reasonably implied or fairly inferred from the notice of claim (*Chan v City of New York*, 238 AD3d 446, 446 [1st Dept 2025] [allegation that defendants created a hazardous condition by failing to place a mat on the floor where plaintiff ultimately fell cannot be fairly inferred from the allegation that City negligently allowed water/liquid to accumulate on the floor]; *see Boles*, 2012 NY Slip Op 51790[U], 36 Misc 3d 1241[A], at *4 [collecting cases])

Another way to determine whether allegations in the bill of particulars assert a new, distinct theory of liability is whether the notice of claim would have alerted the defendant of the need to investigate the allegations claimed to be outside the scope of the notice of claim (*see Pratts v Campolo*, 150 AD3d 549, 550 [1st Dept 2017] [notice of claim premised solely on the City's non-enforcement of parking restrictions did not alert the City of the need to investigate its own employees' parking practices]; *see Monmasterio v New York City Housing Auth.*, 39 AD3d 354 [1st Dept 2007] [notice of claim, which alleged inadequate lighting in parking lot, would have alerted defendant to need to investigate number and adequacy of security personnel it employed]).

Here, in the court's view, the failure to install guard rails or barriers pleads a new theory of design defect of the subway platform, not a theory of general negligence (*see Frankel v New York City Tr. Auth.,* 134 AD3d 440 [1st Dept 2015] [allegation that the accident was caused by a portion of missing handrail is a new theory of liability]; *Chipurnoi v Manhattan and Bronx Surface Tr. Operating Auth.*, 216 AD2d 171, 171 [1st Dept 1995] [slippery seat theory was essentially a claim of design defect]; *see also Kane v Triborough Bridge & Tunnel Auth.,* 8 AD3d 239 [2d Dept 2004] [negligence in failing to install a median barrier or certain warning signs on the bridge substantially altered the nature of plaintiff's claim that defendant negligently maintained the bridge's metal grating]). The original notice of claim alleges that the area where plaintiff entered was unsafe because it was too narrow for his wheelchair to navigate. The installation of guard rails or barriers is not an amplification of the theory that the area was too narrow.

Plaintiff's argument that the additional allegations amplified violations of the Americans with Disabilities Act (ADA) alleged in the notice of claim is unpersuasive.

Plaintiff does not explain how the failure to install guard rails or barriers along the platform edge would violate of the ADA, as such guard rails or barriers would not enlarge the area, or otherwise provide access because the area was already too narrow for wheelchair-bound users to traverse. Although the coordination of train schedules with handicapped passenger volume does speak to providing access, this allegation cannot be fairly inferred from the notice of claim, which does not mention anything about the timing of train arrivals and departures or the volume of handicapped passengers. The NYCTA would not have been alerted to investigate the train schedules and elevator availability based on the allegations in the notice of claim.

The remaining allegations that were added in the second amended bill of particulars were otherwise within the scope of the allegations of the notice of claim.

The allegations contained in the notice of claim fairly imply a theory of premises liability, based on the narrowness of the area where plaintiff went. The failure to warn, either by providing signage and warnings or marking an area as hazardous, and the failing to close off the narrow path to disabled people with motorized or manual wheelchairs, is consistent with that theory.

The allegation that the NYCTA "fail[ed] to properly position the designated boarding area for handicapped persons" is contained in the notice of claim. The notice of claim alleges that the NYCTA negligently placed the designated boarding area on the L train platform could only be reached from the elevator by traversing an area of the platform that was too narrow for wheelchair-bound customers. "Failing to properly position" the designate boarding area is similar to "negligent placement" of the designated boarding area.

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8/1/2025
DATE

RICHARD TSAI, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[ ]	**DENIED**	[X]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**			[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**			[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**